74-492

Supreme Court, U. S.
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IN THE SUPREME COURT OF OHIO

STATE OF OHIO Petitioner	*	CASE NO. 73-623 (Court of Appeals Case No. 4158 C.A.)
-vs-	*	
TERRY L. GALLAGHER Respondent	*	(Common Pleas Court Case No. 72-CR-826)

BRIEF OF RESPONDENT OPPOSING

WRIT OF CERTIORARI

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Statement of Facts

On or about May 27, 1972, the Seven/Eleven Store, located at 405 Xenia Avenue, Dayton, Ohio, was the scene of an armed robbery.

According to the testimony of the clerk who was allegedly robbed at that time, there were approximately six persons within the store. Two men standing side by side were within arms length, one with a gun.

According to the testimony of said victim, one of the robbers was a tall man who had the gun, who made all the statements as to taking the money, and who, in fact, did all of the actions alleged to have happened.

The victim then identified the Respondent, hereinafter referred to as such, as the person standing next to the person who conducted the robbery. The victim admitted that Respondent said nothing, did nothing, had no weapon, did not place said victim in fear, and in no way physically or orally participated in any manner in the conduct of the robbery.

Police officers attempted to testify at the trial of this cause, and their testimony, as to any statements taken from Respondent, were suppressed by the Court after a Motion hearing and were held to be inadmissable. Absent the testimony of a parole officer, William Sykes, the State's case is entirely devoid of any evidence which would connect Respondent with the person who allegedly robbed the Seven/Eleven Store.

At the trial of this cause, a parole officer, William Sykes, testified that he had conversations with Respondent while Respondent was incarcerated in the jail of the Dayton Police Department. The first of such conversations was conducted on or about June 26, 1972, prior to the time when Respondent was furnished legal counsel, Respondent being indigent and without funds to hire a lawyer.

At such meeting on June 26, 1972, Respondent indicated to Parole Officer Sykes that he did not wish to discuss the charges against him in connection with this incident.

Parole Office Sykes returned to the Dayton Jail to again discuss with Respondent this alleged crimeon July 3, 1972, again prior to the time that counsel was appointed to represent Respondent.

During the trial of this cause, Parole Office Sykes was permitted to testify as to a conversation had between himself and Respondent with regard to the alleged robbery occurring May 27, 1972, at the Seven/Elcven Store, 405 Xenia Avenue, Dayton, Ohio.

Parole Officer Sykes testified that he at no time advised Respondent of his rights guaranteed or set forth in the case of MIRANDA -v- ARIZONA.

The Court, over objection, permitted Mr. Sykes to testify as to statements made by Respondent at that time, July 3, 1972, with regard to the alleged robbery, of which Respondent had, at that time, been accused and charged, the statements of Parole Officer Sykes being the only evidence tending to or in any way showing that Respondent, in fact, was involved. Parole Officer Sykes was permitted to testify that Respondent at that time stated to him that he went to the food store with the person who robbed such store, and that Respondent stated to him that he had a weapon, that he was prepared to use it, and that he and the other robber acted in concert.

These statements, admitted over the objection of defense counsel, are the only statements which in any way tie Defendant tothe alleged robbery.

Further, it is admitted by the investigating officer that even though identification had been made of the prson or the principal involved in the crime, that said principal was never charged with the offense of armed robbery.

Upon conclusion of the trial, Respondent was found guilty of armed robbery and sentenced to a term of ten to twenty-five years in the Ohio Penitentiary.

An appeal was duly taken and on May 30, 1973, the Court of Appeals for Montgomery County, Ohio, affirmed the Judgment of conviction. Subsequent appeal was taken by Respondent to the Supreme Court of Ohio and on June 26, 1974, the Supreme Court of Ohio reversed Respondent's conviction.

RESPONSE TO PETITIONER'S REASON FOR GRANTING THE WRIT

I.

Respondent contends that under the Statutory Law of the State of Ohio, the parole officer, acting under color of authority of the Adult Parole Authority, is in effect, a police officer, as invisioned by the intent, if not the exact letter, of the ruling in the case of

MIRANDA -v- ARIZONA, 384, U.S., 436 (1966)

"There is hereby created in the Division of Correction of the Department of Mental Hygiene and Correction at bureau level an 'Adult Parole Authority'....."

SECTION 5149.03 OHIO REVISED CODE, provides as follows:

"The adult Parole Authority shall administer Chapter 5149, and provisions of chapter 2967.00 and Sections 2301.27, 2301.32, inclusive, 2905.28, 2941.46, 2951.05, 2951.06 and 2951.08, of the Revised Code, as imposed duties upon the Authority."

Sections 2941.46, 2951.05, 2951.06 and 2951.08 are statutes empowering persons designated as probation officers, deputy sheriffs, police officers, etc., to make arrests under given circumstances. By granting or imposing upon the Adult Parole Authority the provisions of each of the Sections and by empowering it's parole officers to act under such sections, the Legislature has, in effect, if not in fact, given to the parole officer the authority to make arrests, to incarcerate persons and to, in general, carry out many of the activities carried out by duly authorized, sworn police officers.

Section 5149.05, OHIO REVISED CODE, in fact, gives parole and field

officers of the Adult Parole Authority the authority to carry firearms. Section 5149.23 (a) OHIO REVISED CODE, gives the Adult Parole Authority the authority to deputize agents, which shall have all the powers of police officers in this State.

In addition, parole officers have the authority to arrest persons under their control for <u>suspected</u> violations of the conditions of their parole, to place parole detainers on persons arrested for crimes even before they are, in fact, convicted of such crimes, and to in many ways deprive persons of their freedom.

To say that such persons are not 'police officers' of the State is to, in fact, completely ignore the intent of the decision in <u>MIRANDA -v- ARIZONA</u>, supra. In the instant case, the parole officer admittedly questioned Respondent, or if the Court prefer, discussed the matter with Respondent, while Respondent was incarcerated in the Dayton Jail. (BE 151-159) The parole officer admitted (BE 165) that he had the power to recommend the returning time of parolees to the penal institution from whence they were paroled. The parole officer admitted (BE 151) that on June 26, 1972, when he had attempted to question Respondent with regard to this matter, Respondent stated that he did not wish to make a statement with regard to the circumstances surrounding his arrest for this alleged crime.

The parole officer testified (BE 166-167) that he did not, in any manner, advise Respondent of his Constitutional rights, his right to counsel, his right to remain silent, that anything he said could and would be used against him in Court.

Further, the Court's attention is directed to the case of <u>MATHIS -v- UNITED STATES</u>, 391 U.S., 1

In that case, a Petitioner was convicted in the United States District Court on two counts of 'Knowingly filing false claims' in connection with his tax returns. The Petitioner was incarcerated in a state penal institution on a state charge. During such incarceration, an investigator from the Internal Revenue Service questioned the Petitioner on numerous occasions, eliciting statements and documents which were substantially and subsequently presented in the prosecution of the petitioner under the federal charges.

The tax investigator admittedly did not advise the Petitioner of his Constitutional Rights under the <u>MIRANDA -v- ARIZONA</u>, decision. In considering whether or not the tax investigator was required to so advise the prisoner, the Court held that (Pg 4)

"It is true that a routine tax investigation may be initiated for the purpose of a civil action rather than criminal prosecution. To this extent, tax investigations differ from investigations of murder, robbery and other crimes. But tax investigations frequently lead to criminal prosecutions just as the one here did.....and, as the investigating Revenue agent was compelled to admit, there was always the <u>possibility</u> during his investigation that his work would end up in criminal prosecution. We reject the contention that tax investigations are immune from the Miranda requirements for warnings to be given to a person in custody".....(emphasis added)

"The government also seeks to narrow the scope of the Miranda holding by making it applicable to only questioning of one who is in custody in connection with the very case under investigation. There is no substance to such a distinction, and, in effect, it goes against

the whole purpose of the Miranda decision, which was designated to give meaningful protection to Fifth Admendment Rights." .....

.....(emphasis added)

As is stated in MIRANDA -v- ARIZONA, 384 U.S. at page 478:

"To summarize, we hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized."

It is Respondent's contention that the parole officer, William Sykes, had a duty to inform Respondent of his rights to an attorney, to remain silent and most important, that any statement he made could and would be used against him in any trial of this cause.

In comparing the instant case with the case of

MATHIS -v- U.S.,

the Court may state or may feel that tax investigations are entirely different than investigations conducted concerning a robbery. However, the important language in that case is that investigations frequently lead to criminal prosecution, just as the one here did, and is even more important to the instant case.

In the instant case, Respondent was not only a suspect in the crime which was the cause of this trial, but was, in fact, charged with the offense of armed robbery at the time he was questioned by Mr. Sykes.

It is undisputed in the record that the parole officer, William Sykes, knew that Respondent, was in fact, charged with armed robbery; and that he must have known that his testimony could have been used at trial. For this reason, alone, the parole officer should have advised the Respondent of his

Constitutional Rights.

The cases relied upon by the Court of Appeals for Montgomery County, Ohio, in dismissing appellant's appeal are summarized as follows:

PEOPLE -v- RONALD, W., 24 N.Y. 2nd, 732, 302

N.Y.S. 2nd, 260, 262 (1962)

This case is clearly inapplicable to the instant case, inasmuch as, it involves a probation revocation proceeding and does not, therefore, involve the admissability of statements of a probation officer in a trial of a probationer or parolee in a subsequent criminal proceeding.

In the RONALD, W. case the Defendant or Appellant, Ronald W. had been previously convicted of a crime and placed on probation. He, subsequently, in an interview or discussion with his probation officer was noticed to have needle markes on his arm.

In a discussion with his probation officer regarding said needle markes, the probationer admitted that he had been using heroin which was a violation of the conditions of his probation.

The statements and admissions made to the probation officer were admitted in a subsequent probation revocation hearing wherein it was alleged that the probationer had violated the terms of his probation.

It should be noted that an express requirement of the probationer's probation in that case was that he answer all reasonable inquiries of this probation officer.

It should further be noted that the probationer was not, in fact, in custody at the time of the interrogation and, therefore, the provisions of MIRANDA -v- ARIZONA would not apply.

That case has no applicability to the case at hand.

GILMORE -v- PEOPLE (Colorado), 171 Colo. 358, 457 P. 2nd, 828 (1970)

In this case, the Defendant-Appellant or as they are referred to in Colorado the Plaintiff-in-error was convicted of simple assault and of unnatural carnal copulation.

A part of the evidence presented against him was a statement or statements made to his federal probation officer.

Subsequent to his arrest, Gilmore denied any connection with the crime with which heuas to be charged; however, he requested that his federal parole officer be called to the police station for a conversation.

At the police station, the Defendant made these statements which is not confessions, were in the nature of admissions against interest to his parole officer.

These statements were not elicited by parole officer, Fuller, nor did Fuller attempt to interrogate the Defendant about the crime with which he was charged.

As is quite obvious, the Gilmore case is distinguishable from the case at hand, inasmuch as the parole officer in that case was summoned to the police station by the Defendant who was at that time in custody. It should be noted that the Parole Officer was in no way attempting to question the Defendant about the crime with which he was charged. Such is not the case at hand. It is obvious from the testimony from the record, as indicated, that, in the instant case parole officer Sykes went to the jail, wherein, Respondent was incarcerated and on two occasions, not at the request of Respondent, but of his own volition. On June 26, Respondent refused to answer any questions concerning the offense with which he was charged. On July 3, he made statements to the parole officer with regard to the offense charged only upon questioning by parole officer Sykes. Clearly the statements made to the parole officer in the

Gilmore case were not made in response to an interrogation as in the case at hand; and clearly, the Respondent herein did not summon or request the presence of parole officer Sykes as did Gilmore in the case of GILMORE -v- PEOPLE.

For these reasons, the case of GILMORE -v- PEOPLE herein cited, has no relevance and no applicability to the instant case.

NETTLES -v- STATE, (Florida) 248, 2nd, 259 (Florida District Court of Appeals, 1971)

The Nettles case cites the case of PEOPLE -v- RONALD W., supra and follows the theory of the case that a person who takes advantage of the parole opportunity waives his right to constitutional Miranda warnings when he accepts probation and states further that this waiver continues in effect even on a new and fresh crime as regards his probation officer.

This proposition has no validity taken in the context of the constitutional guarantees made to every citizen of the United States as is well pointed out by Judge Mann in his dissenting opinion in that case.

Judge Mann's dissenting opinion states, in part:

"Such a proceeding is indiepended of the probation revocation proceeding unless the majority imply acceptance of probation carries with it an implied waiver of constitutional rights while probation continues. It is doubtful that even an expressed waiver of constitutional right in future cases could be held but we need not contemplate that. I think it's clear that there is not a waiver of the Fifth Amendment by implication see SPEVACK -v- KLEIN, 1967, 385, U.S., 511, 87 Supreme Court, 616, 17 Lawyers Edition September 5, 1974; GARRITY -v- NEW JERSEY, 1967, 385 U.S., 493, 87 Supreme Court, 625, 17 Lawyers Edition Second 562."

It would appear that the Nettles' case and the case of NEW YORK -v- RONALD W., base their opinions upon the fact or the assumption in view of the case cited in Judge Mann's dissenting opinion.

STATE -v- JOHNSON, (South Dakota), 202 N.W. 2nd, 132 (1972)

Defendant was charged with and found 'guilty' of the crimeof 'obtaining money and property under false pretenses.' According to the facts of the case, the Defendant was on probation for a previous violation and issued a check on a bank where he had no account. His probation officer testified that he went to Defendant's home to question him about the check issued; and that the two conferred in the yard outside Defendant's home, during which time Defendant admitted issuing the check but claimed it had been paid off.

Defendant contended that he had been subjected to custodial police interrogation and was entitled to a warning of his rights as required by Miranda. In overruling and/or dismissing Defendant's appeal the Court said:

> "Miranda warnings do not have to be given on all interrogations. They must be given prior to questioning initiated by law enforcement officers after the person has been taken into custody or otherwise deprivcd of his freedom of action in any significant way. Neither of these compelling factors is present here." .....(emphasis added)

The Court goes on to states that the probation officer does not have a peace officer's broad power of arrest.

The Johnson case is obviously, as the other cases cited by the Court, not applicable and is distinguishable from the present case. Apparently, the parole officers in this state have more broad arrest powers than the parole officers in the state of South Dakota. However, that is not the main distinguishing character of that case.

It is obvious from the statement that the two conferred in the yard outside the Defendant's home, that the Defendant was not in custody and merely had a conversation with his probation officer outside his home and not in the custody or in the custodial atmosphere of the police station.

In the instant case as previously mentioned, this Respondent was in fact, in custody and was questioned on not one, but on two occasions by his parole officer after said parole officer had been advised that the Defendant had no desire to discuss the case. The cases binding as inadmissable statements made to parole officers without giving the person in custody the advice that he has a right to a lawyer and to remain silent are as follows:

PEOPLE -v- GASTELUM, (Calif) 237 Cal., App. 2nd 205, 46 Cal. R. 743 (1965.

The Gastelum case was decided by the District Court of Appeals Fifth District of California, September 23, 1965, prior to the United States Supreme Court holding in MIRANDA -v- ARIZONA.

In that case, after discovering that his parolee had been using drugs prohibited by the terms of his parole, the parole officer accompanied by police officers went to the parolee's residence and found drugs. Subsequent to such findings, and while in custody, the parolee made confessions or admissions to his parole officer which had been admitted in his trial and which resulted in conviction. The California Court of Appeals stated that:

> "The only nominal question is whether, by anology to the rule on search and seizure, Defendant's status as a parolee negated his Constitutional Rights to be advised of his right to counsel or to remain silent. The Supreme Court, in PEOPLE -v- DERATO, supra affirmed the right of a felon in carcerated in the state prison

to be effectively informed of his right to counsel and of his absolute right to remain silent under the Fifth and Sixth Amendments. Certainly a parolee in constructive custody is no less entitled to these constitutional rights than is a felon in actual custody. Therefore we conclude that the rule of DERATO is applicable to a parolee and that it was a reversible error to admit Defendant's confession in evidence."

Further at page 746:

"The Supreme Court of California, following principles enunciated by the United States Supreme Court, has held that the introduction of an involuntary confession elicited in violation of Defendant's rights under the Fifth Amendment to the United States Constitution constitutes a reversible error, per se."

STATE -v- LEKAS, (Kansas) 201 Kan. 579, 442 P. 2d 11 (1968)

In the Lekas case Defendant was taken from his home by a parole officer and a police officer, being suspected of having a weapon in his possession and further being suspected of preparing to leave town. Based upon these suspicions he was, in fact, removed and taken to the police station where his parole officer alone questioned him regarding the possession of said weapon. The Defendant admitted the possession of the weapon to the parole officer and his admissions and subsequent evidence derived from said admission was introduced against him.

The Defendant was convicted and based his appeal upon the grounds that the parole officer did not advise him of his rights set forth in the Miranda decision. The Supreme Court of Kansas stated at page 15:

"It should be emphasized that the issue here presented is not whether the Appellant's parole can be revoked after the Appellant

confesses to the parole officer concerning a new crime, without first having been informed of his Constitutional Rights. Here the incriminating statements admitted into evidence were used to convict the Appellant for a new offense."

This is the issue confronting the Court.

The Kansas Statute sets forth the powers and authority of the Kansas State Board of Probation and Parole:

"And all persons employed under the provisions of this act as probation or parole officers shall have and exercise police powers to the same extent as other peace officers and such powers may be exercised by them anywhere within this state."

The Kansas Court further states that on page 15:

"As we construe the Miranda Decision, if the incriminating statements elicited from the Appellant while in the custody of the parole officer upon interrogation were to be used for the prosecution of a new offense, the parole officer was required to give the Miranda Warning."

The Kansas Court then goes on to cite the case of MATHIS -v- UNITED STATES, 391, U.S. 1, 88 Supreme Court 1503, 20 Lawyers Edition Second 381 (May 6, 1968).

The Mathis case, of course, is cited in this Brief although not referred to in the decision rendered by the Court of Appeals for Montgomery County.

It should be further noted that the authority conferred upon the parole officers of the State of Kansas is not that much more broad than those conferred upon parole officers for the State of Ohio. The Kansas Court

further stated at Page 16:

"In a situation of this kind the truth of the incriminating statements is immaterial."

STATE -v- WILLIAMS, (Missouri, 486 S.W. 2nd 468 (Missouri Supreme Court, 1972)

Defendant, parolee, was a resident at a regional treatment center and his parole officer made a warrantless exploratory search of his nap sack found on top of his dresser in a closet in his room and found marijuana. Subsequent, to this finding, the Defendant was taken to the city police station where the parole officer advised him of his Miranda rights, however, the parole officer failed to inform the Defendant that if he could not afford an attorney one would be appointed for him.

The Supreme Court of Missouri held that any statements taken subsequent to the advising of the rights and also subsequent to the failure to advise the Defendant that he could have a court appointed attorney, were inadmissable.

The Supreme Court of Missouri held that the search of the Defendant's belongings while in this semi or quasi custodial situation was not in fact, constitutional. That Court stated, however, at page 473:

"The judgment of conviction, however, must be reversed for error in the admission of evidence of

(1) the testimony of parole officers Perry and Cothman, both of whom testified that following his arrest, and at the city police station under questioning by officer Perry, appellant admitted that he acquired possession of the marijuana, after Officer Perry, having advised appellant of Miranda rights failed to inform him that the court would appoint an attorney for him if he could not afford one;

(2) the testimony of police officers who subsequently took a written confession from appellant, and

(3) the written confession."

That Court further held that:

"Miranda requires officers of the Missouri State Board of Probation and Parole in the investigation of facts involving the possible commission by an indigent parolee of a fresh or new felony to give the parolee all four of the Miranda Warnings, where he has been arrested and taken into actual police custody."

In view of the better reasoned State cases cited above and in view of the U. S. Supreme Court holding in the case of MATHIS -v- U.S., it is clear that a parole officer must give the Miranda warnings prior to interrogation of a person who is in custody of the police and charged with a new and different offense from that for which he is on parole.

These admonitions not having been given to appellant in the instant case, the admissions should be held to be inadmissable.

RESPONSE TO PETITIONER'S REASON FOR GRANTING THE WRIT

II.

Petitioner raises the question as to whether or not Miranda type warnings must be given at the time of each interview once they have been given and the rights effectively waived. It is clear from an entire reading of the transcript of proceedings and from a reading of the decision of the Ohio Supreme Court (appendix 'A' of Petitioner's Brief) that the trial court and the Supreme Court of Ohio decided that due to the police officers having offered to not file additional charges against Respondent in exchange for his confession, that the Respondent did act or operate under promises of leniency and that his statements constituted involuntary statements, which, in effect, says that the Miranda warnings given prior to such statements were not an effective waiver of said rights.

To attempt to interpose the rights waiver that was signed and later held to be not an effective waiver of such rights, is to beg the question.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should not be granted.

RESPECTFULLY SUBMITTED:

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IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Petitioner

-vs-

TERRY L. GALLAGHER

Respondent

CASE NO. 73-623

(Court of Appeals, Case No. 4158 CA)

(Common Pleas Court Case No. 72-CR-826)

CERTIFICATION OF SERVICE

This is to certify that a copy of the Brief of Respondent opposing Writ of Certiorari submitted by the Respondent in said cause, Terry L. Gallagher, has been duly served upon opposing counsel, Randal A. Anderson, Jr, Assistant Prosecuting Attorney, Montgomery County Courts Bldg., 41 North Perry Street, Suite 308, Dayton, Ohio 45402.

HARRISON & SCHWARZ

By Jack T. Schwarz

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